THE VIRGINIA STATUTE OF JEOFAILS.*

As early as 1792, if not before, the legislature of Virginia had enacted, "that in all personal actions, where the declaration shall plainly set forth sufficient matter of substance for the court to proceed upon the merits of the cause, the suit shall not be abated for want of form;" and that on demurrer, "the court shall not regard any other defect or imperfection in the writ, return, declaration, or pleadings, than what shall be specially alleged in the demurrer, unless something so essential to the action or defence as that judgment according to law and the very right of the cause cannot be given, be omitted;" and that "no judgment after the verdict of twelve men shall be stayed or reversed for any defect or default in the writ, original or judicial . . . . or for any mispleading or insufficient pleading, . . . or for the omission of the words 'with force and arms,' or 'against the peace,' . . . or for omitting the averment of any matter without proving which the jury ought not to have given such a verdict." And by amendments of 1819 it was provided that no such verdict should be stayed or reversed "for the setting forth by way of recital of any matter which ought to have been set forth by amendment; . . . or for any mistake or misconception of the form of the action; or for any other defect whatsoever in the declaration or pleading, whether of form or of substance, which might have been taken advantage of by a demurrer and which shall not have been so taken advantage of." 1 R. C., 1819, ch. 128, p. 511, and notes.

Between the revisals of 1792 and 1819 there had been rendered by our Supreme Court several decisions that were surprising to the profession. Among the first, decided in 1808, was the decision in *Taylor* v. *Rainbow*, 2 H. & M. 423. The action was trespass on the case, and the Supreme Court decided that upon the facts set forth in the declaration trespass ought to have been brought, and reversed the judgment of the lower court, awarding the plaintiff the damages assessed by the jury, although the declaration stated fully every fact necessary to sustain the plaintiff's claim.

The distinguished reporters and lawyers, William W. Henning and William Munford, showed their disapproval of this decision in introducing the report of it. "In this case," said they, "the much agitated question whether *trespass vi et armis*, or trespass on the case, was

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the proper action (between which the law says there is a nice distinction, but the reason of which it is often difficult to discover), was the only point considered by the court." And evidently that very eminent lawyer, Benjamin Watkins Leigh, to whom was committed, in chief, the responsible task of the revisal of 1819, knowing of this and other like decisions, then caused to be amended the statute of jeofails of 1792 by declaring, as is above seen, in express terms, that "no judgment after a verdict of twelve men shall be stayed or reversed for any mistake or misconception of the form of the action," in order to prevent the recurrence of such miscarriages of justice in the future. It was conceded by the judges in their opinions that the declaration was sufficient in substance to support the verdict and judgment, but it was asserted that the great point in question was whether the pleader had not made a mistake in framing the declaration in case instead of trespass. The phraseology of the declaration is critically examined, and elaborate arguments and citations of old English cases are made, to show that, according to all the authorities, this mistake in pleading had been made, and that it was fatal. No reference whatever is made by bar or bench to the statute of jeofails; and all the judges express regret at being compelled, by the precedents, to deprive the plaintiff of the fruits of a judgment to which the facts alleged and certified showed him to have been clearly entitled. Judge Fleming, the president of the court, thus commenced his opinion:

"Were it not that I think myself tied down and bound by precedents, I should have differed in opinion from the judges who have preceded me on the first great point in this case (to-wit, the nature of the action), because it does appear to me, from the reason of the thing, and upon sound general principles, that three things only are essentially requisite to maintain an action: First, that the plaintiff make out such a case as will entitle him to recover; secondly, that he state his case in such a manner as to afford the defendant a fair opportunity of making a full and complete defence; and thirdly, so that a recovery in the suit may be pleaded in bar to any future action for the same cause. All this seems to have been done in the case now before the court."

It is wonderful that these learned judges should have ignored completely the provisions of the statute of jeofails above quoted. Supported by them, if called to mind, they would, as seems obvious, have discarded the precedents by which they deemed themselves bound, and, following the statutes which declare that "where the declaration shall plainly set forth sufficient matter of substance for the court to proceed upon the merits of the cause, the suit shall not abate for want of form," and that upon general demurrer, "no defect or imperfection

shall be regarded, unless something so essential to the action or defence as that judgment, according to law and the very right of the case, cannot be given, be omitted," they would have concurred with the judges of the Norfolk Borough Court and of the District Court, and have affirmed their judgment.

Several other cases were decided in the same way by the same court about the same period. *Moore's Adm'r* v. *Downey*, 3 H. & M. 127, is notable, for the reason that the court reversed a judgment upon a verdict in an action of trespass, because the pleader declared "for that whereas," instead of "for that." There had been no objection taken by counsel to the "whereas," either in the court below or the court above. But the court, *mero motu*, held the use of the "whereas" to be fatal. Expressing reluctance and mortification in being compelled by precedent of the same court "to decide against the real merits of the case," the distinguished and learned judge, St. George Tucker, the eminent head and progenitor of a family that have, in law, literature, and politics, enriched the annals of Virginia, took occasion to administer a mild rebuke to members of the bar. "It is much to be lamented," said he, "that the inattention of gentlemen of the profession to their pleadings, should so often defeat the substantial justice of their clients' causes, as many late decisions here prove. Their publication, it is to be hoped, will operate as a warning to counsel in future, not to sacrifice their clients' interests by a degree of negligence, inattention, or want of skill, which it is difficult to excuse." It seems to me the gentlemen of the profession might very well, and with great justice, have retorted in about the same language to the judges.

Evidently the members of the bar in those days were not pedants in pleading. They gave little thought to the punctilios and peccadillos, but much to the substantial averments and principles involved.

In 1824 the case of *Cleek* v. *Haines*, 2 Ran. 440, came on, and the identical question involved in *Taylor* v. *Rainbow* was decided just the other way, the court holding that it was within the letter of the late amendment of the statute of jeofails, and that the merits had been as fairly tried as if the action had been trespass and not trespass on the case. Thus early after the decision in *Taylor* v. *Rainbow* was the principle on which it was based excised by the legislative scalping-knife, which the court felt constrained to apply; and never since then has it been reasonably possible for any suitor to suffer the injustice inflicted upon the plaintiff in *Taylor* v. *Rainbow;* never since then has

it been the law in Virginia "that, if the plaintiff has mistaken his action, the court will be constrained, however great the hardship may be, to reverse any judgment rendered in his favor."

Any one who will take the pains to investigate will find that there has been a wonderful ignoring, by bench and bar, of the statutes of jeofails. Though, as already seen, the statute of 1819 expressly declared that "no judgment, after a verdict, should be stayed or reversed for any mistake or misconception of the form of the action," and the court in the first case occurring thereafter—*Cleek* v. *Haines*, in 1824—applied the provision, overruling the objection that the action should have been trespass, and not trespass on the case, Brooke, president, remarking that though the verdict and motion in arrest of judgment took place before the act went into effect, yet the judgment was rendered after, and thus brought the case within the mischief intended to be provided against, and that the merits having been as fairly tried in that form of action as if it had been trespass, no substantial right of the defendant could be affected by affirming the judgment; yet, as late as 1847, in *Jordan* v. *Wyatt*, 4 Gratt. 151, we find the same question whether trespass or case was the proper action, trespass being the action there, elaborately discussed by two eminent counsel, each referring to numerous English cases, and each to only one Virginia case—*Taylor* v. *Rainbow*—and neither referring to the act of 1819, nor to *Cleek* v. *Haines*, enforcing it. Judge Baldwin, delivering the opinion of the court, went over the same discussion, likewise ignoring the act of 1819 and *Cleek* v. *Haines*, and arriving at the conclusion that trespass was the proper action, and that no mistake had been made in bringing it, affirmed the judgment. He made toward the conclusion of his opinion the significant and wise remark that "the forms of action must, it is true, be preserved, but it is much to be regretted that, between their narrow jurisdictions, the merits have been too often lost by a confusion or mistake of boundaries; the best security against the evil is to lean, so far as authority allows, to a concurrence of remedies, when the due administration of justice does not require the exclusion of one by another." The inference to be drawn from these arguments is that if the court had not arrived at the conclusion, happily for justice and right, that no mistake had been made in the form of the action, the plaintiff might have met the fate of the plaintiff in *Taylor* v. *Rainbow*. Judge Henry St. George Tucker, in his commentaries issued a few years after the amended statute of 1819, expressed the opinion that the language of the act was sufficiently

comprehensive to break down all barriers between the several forms of action; but he said it was impossible to foresee what the judicial construction would be, though he apprehended that all distinctions would be at once swept away—a result which he thought would be disastrous and much to be deplored. Doubtless it was with reference to such a state of feeling and opinion, that Judge Baldwin made the remark above quoted, "the forms of action, it is true, must be preserved."

Judicial decision has not given to the statute the effect apprehended by Judge Tucker. The statute was not intended to produce such effect. It was designed, though, to prevent all such miscarriages and destruction of justice and right as occurred in *Taylor* v. *Rainbow* and *Moore's Adm'r* v. *Downey*. I fear it has not been permitted to have this effect in all cases; that it has not uniformly been suffered to embrace and cure defects that were obviously within the mischief intended to be provided against, and within the letter of the statute. The very recent case, *Chewning & Sands* v. *Wilkinson*, 4 Va. L. Reg. 26, justifies this apprehension. It is apparent that the real facts and law of the case, upon which the rights of the parties must ultimately depend, had been just as fairly and completely investigated and justly determined in the court below, as they could be upon the most correct and formal pleading; and yet the judgment of the court below was reversed because, as held by the court above, the pleas did not justify the proof of the facts, and to authorize their proof there should have been an additional special plea—which holding, it seems to me, was directly in the teeth of the provision that judgment shall not be stayed or reversed for any "mispleading or insufficient pleading."

It is by decisions like that in *Taylor* v. *Rainbow* that our system of pleading and procedure has been brought into disrepute. Our judges, always respected, and generally venerated for their talents and integrity, the laity, and the bar, too, have been prone to attribute such miscarriages of justice, and the concomitant evils of delays and accumulated costs, to the law, rather than to mistake in its administration. Thus the law has been made the vicarious sufferer.

It is not to be controverted, I think, that the express provisions of the statute of jeofails of 1819, which statute still gives the law, though the phraseology—for purposes of condensation—was changed in the Code of 1849, are amply sufficient to show the legislative intent, that no judgment after a verdict should be stayed or reversed, for any mistake in the form of the action, any mispleading or insufficient pleading, or for any other defect or imperfection, where enough appeared to enable the court to give judgment according to the very right of the cause. In the matter of pleading, at law as well as in equity, the substance of the statement, and not the mere form of it, is to prevail.